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IN THE

Supreme Court of the United States

October Term, 1954

No. 393

IRVING M. RUBENSTEIN, a/k/a IRVING M. RUBY,
Petitioner

v.

THE UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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In The

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Irving M. Rubenstein, a/k/a Irving M. Ruby,
Petitioner

v.

The United States of America

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Irving M. Rubenstein, also known as Irving M. Ruby, respectfully prays that a writ of certiorari be issued to review an opinion and judgment of the United States Court of Appeals for the Tenth Circuit insofar as it affirmed a judgment of the United States District Court finding petitioner guilty of income tax evasion and sentencing him to imprisonment for three years and to pay a fine of Ten Thousand Dollars ($10,000).

OPINIONS BELOW

The opinion of the Court of Appeals (R. 441-445 and Appendix A hereof) is reported at —— F. 2d ——. There was no written opinion by the District Court.

JURISDICTION

The judgment of the Court of Appeals was entered on August 4, 1954 (R. 446). A petition for rehearing was denied on September 1, 1954 (R. 460). By an order entered September 24, 1954 by Mr. Justice Reed, the time for filing a petition for writ of certiorari was extended to and including October 7, 1954. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. §1254 (1) and Section 37(b)(2) of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. May a criminal conviction for tax evasion, based upon a net-worth-plus-expenditures theory, be sustained where the Government, in lieu of establishing a starting-point net worth, presents evidence that special agents of the Internal Revenue Service confronted the taxpayer with tentative net worth computations for prior years and the taxpayer failed to satisfy them as to the incorrectness of the tentative net worth computations?

2. May such a conviction be sustained where the taxpayer's substantial net worth is represented by his investment in a mercantile business conducted in partnership with his wife, and the Government does not attempt to establish a starting-point net worth for the taxpayer's wife and partner?

3. May a conviction be sustained where the trial court engages in comments calculated to prejudice and inflame the jury against the taxpayer, including an inquiry of the taxpayer's counsel whether he was going to put the taxpayer on the stand (R. 165), a comment to the taxpayer's counsel that "you have tried this case in the most inexpert

manner that I have seen for a long time" (R. 305), and an injunction to the taxpayer's counsel to refrain from arguing "until you know what you are talking about" (R. 115).

STATUTE INVOLVED

Section 145(b) of the Internal Revenue Code provides (Title 26 U.S.C. §145(b)):

> *Failure to collect and pay over tax, or attempt to defeat or evade tax.* Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

STATEMENT

Petitioner was indicted on a two-count indictment charging him with willfully and knowingly (1) attempting to defeat and evade income taxes in violation of Section 145(b) of the Internal Revenue Code in stating that his net income for 1946 was $11,851.22 on which the amount of tax owing was $2,815.29 whereas his net income was $25,188.14 upon which he owed a tax of $9,187.45, and (2) aiding, procuring, and advising the preparation of a fraudulent return of Zelda Rubenstein (his wife and co-partner) in violation of Section 3793(b)(1) in that it was represented her net income for 1946 was $11,707.71, with tax due thereon of $2,763.48, whereas he knew she had a net income of $25,044.63 on which the tax owed was $9,107.01

(R. 5-6). Petitioner was found guilty as charged (R. 19-20), and was sentenced to imprisonment for three years on each count (to run concurrently) and a fine of $10,000 was imposed on each count (R. 20-21).

The Court of Appeals affirmed the judgment of conviction under count 1 but reversed the judgment of conviction under count 2 in the view that there was no sufficient evidence to show that petitioner had procured or advised his wife's income tax return. (See Appendix A hereof, pp. 19-23).

Petitioner and his wife organized in January 1943 a merchandise partnership in Denver, Colorado. Petitioner had advanced 60% of the capital, and his wife 40%, each sharing equally in the profits (R. 259; 289). The business was continued until mid-1948 when petitioner, having suffered a heart attack, sold out (R. 260; 289). The partnership conducted a wholesale business, dealing in novelties, and variety and drug store specialties (R. 259; 290). Petitioner did business on a nation-wide basis, requiring considerable travel, and did the buying and selling while his wife managed the operation of their Denver store (R. 290).

The Government's case was rested upon net worth computations, built up from January 1, 1943 to December 31, 1946 and derived as the result of its investigation and a series of interviews with petitioner extending from April 1948 through early 1949. At the first "major interview" between the special agent and petitioner (R. 94), petitioner furnished the special agent an affidavit as to his net worth on January 1, 1943 (R. 96-97; see Ex. 48, R. 383-385). The special agent then reconstructed net worth statements for the end of 1943, 1944, 1945, and 1946 (See R. 96-106). The Government never introduced any definitive tabulation as to what it considered to be petitioner's

net worth at the start of the alleged tax evasion year. No evidence was introduced to prove that the asserted increase in net worth was attributable to taxable net income, to identify the source of the asserted increase in net worth, or to refute the possibility that the asserted increase in net worth was attributable to such non-taxable sources as gifts. No evidence was introduced to establish net worth figures for petitioner's wife (and partner in his business).

Instead, the special agent of the Internal Revenue Service testified that *in an interview with petitioner he presented him with net worth computations* for 1944, 1945, and 1946 (reconstructed from petitioner's January 1, 1943 statement of net worth) which concluded that petitioner and his wife's net worth increased in calendar year 1946 by a sum certain. The agent testified extensively what this "computation, a tentative computation," (R. 101) disclosed, and further testified that explanations, if any, were offered by petitioner (R. 97-107). On cross-examination, the agent explained that "the figures I was reading were the things discussed at that time. You will find, as the evidence is presented, that there will be some changes. - - - I want to tell you, these are not the final figures we will have when we get through. These are the figures discussed in our net worth to arrive at some figure which at that point of checking were explanations to make a reasonable cause for this increase other than a mis-reporting of income - - - Substantially you will find that the net worth as is finally determined will be *without* [sic] two or three thousand dollars of the figures I am giving in these interviews" (R. 123-124).

The Government produced a series of witnesses (e.g., the real estate broker who sold petitioner his home (R. 50), bank officials who testified as to petitioner's accounts

(R. 30, 34, 35-36), and a debtor of petitioner's (R. 68)), who testified as to specific assets of petitioner *at the close of 1946* but who only incidentally provided any information as to his assets at the beginning of 1946. Apart from petitioner's statement as to his net worth on January 1, 1943, and the special agent's testimony set forth above projecting tentative computations for later years, there was no other evidence as to petitioner's net worth at the start of the alleged tax evasion year.

The complete evidence on net worth at the *start* of the alleged tax evasion year (1946) was, therefore, the testimony of the special agent as to the *tentative* computations with which he confronted petitioner in his interviews. The special agent testified that these tentative computations shown to petitioner concluded that petitioner and his wife's net worth had increased in calendar 1946 by $27,556.01 (R. 105-107; see Ex. E, R. 396 at 400-401, being the notes from which the agent testified which petitioner offered in evidence). Tabulating the special agent's testimony (as sometimes confirmed by his notes, Exhibit E) disclose that the special agent confronted petitioner with the following tentative computations of petitioner and his wife's alleged net worth at the beginning and end of 1946:

	Net Worth at 12/31/45	*Net Worth at 12/31/46*	*Change (Decreases in Parentheses)*
Partnership Investment	$48,415.35	$ 64,517.44	$16,102.09
First National Bank of Denver Checking Account	858.12	315.66	(542.46)
Denver National Savings Account	626.64	1,545.01	918.37
Automobile	1,200.00	0	(1,200.00)
Investment in Investors Syndicate	732.50	732.50	None
U. S. Bonds	20,443.75	17,050.00	(3,393.75)
Home	10,274.21	10,274.21	None
Deposit on automobile	100.00	100.00	None
Mink coat	2,280.00	2,280.00	None
Stock shares	6,739.36	6,739.36	None
Acct. receivable	.35	.35	None
American National Bank		1,446.76	1,446.76
Cashiers' checks on hand		1,275.00	1,275.00
Partnership checks held by Petitioner		7,000.00	7,000.00
Loan receivable from partnership		4,800.00	4,800.00
Loan receivable from S. Rubenstein		1,150.00	1,150.00
	$91,670.28	$119,226.29	
Less mortgage on home	6,000.00	6,000.00	
	$85,670.28	$113,226.29	$27,556.01

To this assumed increase in net worth of $27,556.01, the special agent added $9,659.84 as personal, non-deductible living expenses for 1946, $5,901.05 as federal and state taxes for 1946, and $3,196.20 as an alleged OPA penalty paid in 1946, resulting in a total net worth increase and expenditures figure of $46,313.10. He then deducted $7,-281.25 in view of explanations offered by petitioner but testified that the result ($39,031.85) was still in excess of reported income of the partnership ($24,415.43; see Exhibit 1, R. 347) by $14,616.42 (R. 107).

There were sharp challenges by petitioner to many of the figures, and the assumptions which underlay them.

These challenges to the figures, and corrections which petitioner sought to make, would have, if accepted, virtually eliminated the approximately $14,600 which the special agent considered was still unexplained. These details are given in Appendix B. Here, it is important to set out only certain general characteristics of this net worth testimony.

(1) It was built up from January 1, 1943, based upon petitioner's statement of net worth at that date. The reconstruction was inherently contradictory since it showed a net worth increase (beyond reported income) of a mere $202.73 in 1943, of $16,158.75 in 1944, an actual *decrease* of $1,672.67 in 1945, and an increase as stated above for 1946.*

(2) The partnership returns for 1943, 1944 and 1945 were examined by an employee of the Internal Revenue Service (R. 152-153) and his conclusion (Ex. A, R. 393) was that the partnership had overreported income of about $1500 in 1943 and underreported income of about $280 and $150 in 1944 and 1945, respectively, resulting in a net overreporting of income of $1,051.31.

(3) There is no increase in the more customary form of assets such as bonds, stocks, cars, home or the like, but actual decreases. The alleged increases in net worth are almost entirely derived from transactions between petitioner and his partnership.

(4) The partnership balance sheets and profits and loss statements for 1943, 1944, 1945, and 1946 (Exhibits 28-31, R. 369-380) which are cardinal in the above net worth computations, were compiled by petitioner's accountant, and accepted and introduced by

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* The figures here given are from the Government's brief (p. 7) in the Court of Appeals. They represent necessary modifications of the special agent's testimony (R. 103-107). In his direct testimony the special agent glided across the fact that his tentative net worth computations showed petitioner overreported his income for 1945 (R. 104-105, see R. 118). Presumably, the 1947 returns of petitioner were also satisfactory since the special agents, investigating in 1948 and 1949, had no complaint about them.

the Government. Petitioner's accountant testified that he set up a complete double-entry system of bookkeeping in 1943 (R. 66), that he had full authority to take care of the books and had received no instructions to omit any records from the books (R. 216), and that petitioner never made any attempt to influence or restrain him against making adjustments in the books which the accountant thought necessary (R. 66).

There was some evidence of unreported income, minor in character and amounts of money involved. The Government's agents, having examined thousands of items (R. 169) and having checked perhaps 50 customers with whom petitioner did business (R. 147), found only a few checks payable to the partnership or endorsed by petitioner which were not reflected on the partnership books. The evidence as to these instances were as follows:

(1) The Government introduced as its Exhibit 40 (R. 381) eight checks of Cooper Drug Company, dated in four different months of 1946, and totalling $1,081.98. None was recorded in the partnership books (R. 156-157). Cooper Drug Company was owned by petitioner's brother, Louis Rubenstein (R. 82-83), and at times petitioner allowed Cooper Drug Company to buy in the name of the partnership so as to have the advantage of the jobber's discount (Ex. F, R. 413-414). Sometimes these transactions went through the partnership records and at other times not (*Ibid.*) As to checks to the partnership, which petitioner personally cashed, petitioner testified that he took the checks as reimbursement for moneys advanced by him to the partnership. More specifically, these checks, and those noted below, were personally cashed by petitioner to reimburse himself for approximately $3,200 of his own funds used to buy merchandise for the partnership from Metropolitan Jobbing Company, a supplier (R. 309-310; see Ex. P, R. 429-433).

(2) Government Exhibits 41, 42, and 43 (R. 381) were checks, all dated in 1946, of two different drug stores payable to McDonald Sales Company, totalling $2,111.30. All were endorsed both by McDonald Sales Company, as payee, and by petitioner. Petitioner testified that McDonald was a "wagon jobber" who drove around to drugstores selling both goods acquired from petitioner's partnership and other concerns. He made payment to petitioner by endorsing his customers' checks to petitioner. Petitioner gave him change as necessary, to the extent the checks exceeded McDonald's bill. (R. 303-304). These checks were personally cashed by petitioner to reimburse himself partially for the $3,200 in merchandise he bought from personal funds for the partnership from Metropolitan Jobbing Company. (R. 309-310).

(3) Government's Exhibit 44 (R. 382) was a check given by Courtesy Drugs, Inc. of Sante Fe, New Mexico (R. 294) in the amount of $190.45 which was personally endorsed by petitioner, and which was not recorded in the partnership books (R. 157). Petitioner at first could not recall the circumstances of this check (R. 294-295), but later concluded that he had personally cashed it as part of the $3,200 reimbursement (R. 313-314).

The case was never viewed or tried as other than a net worth case. In the Court of Appeals, the Government pointed to the checks above, unrecorded on the partnership books, not as showing direct evidence of tax evasion, but as justifying a resort to the net worth method in that the books did not reflect all the partnership transactions.

During the course of the trial, the trial judge engaged in various remarks which, in petitioner's respectful submission, were calculated to prejudice and inflame the jury against him. In lieu of recording them here, they are set forth extensively in Appendix C hereof. It is sufficient here to record that this abstract of the Court's remarks

fails to convey the full flavor of the trial since the trial judge's remarks will be found, in the light of the full record, to have been consistently injected at some point which was at the heart of petitioner's defense. The Court of Appeals, in rejecting petitioner's contention in this respect, remarked that "the record seems to disclose more than the ordinary activity of the trial judge in the taking of the evidence, but it likewise shows that it was apparently inspired by the desire of the judge to expedite the trial rather than to take sides with either the plaintiff or defendant." (*Infra*, p. 21).

The Court of Appeals rendered a very brief opinion (Appendix A hereof). It rejected contentions that the jury was not properly instructed upon the essential elements of the proof required to be established under the net worth theory. It held that its two recent opinions in *Holland* v. *United States*, 209 F. 2d 516, and *Hooper* v. *United States*, 213 F. 2d 30, made it "unnecessary to further add to the legal literature of the Circuit upon the subjects therein discussed." (*Infra*, p. 21)

REASONS FOR GRANTING THE WRIT

I

The issues in this case virtually comprehend those in the *Holland* case, *supra*. The cases were tried before the same district judge who gave similar instructions in both. The Court of Appeals below affirmed petitioner's conviction on the authority of its *Holland* decision.

Under these circumstances, it is our respectful submission that this Court might wish to consider deferring action on the present petition until disposition is made of the *Holland* case. Should that case be ruled adversely to the Government, it may be possible to grant the present

petition and dispose of the case on the authority of the *Holland* case. In *Watts* v. *United States,* No. 135, October Term 1954, the United States, in opposing the grant of a petition for certiorari, concluded (Government's Brief In Opposition, p. 22):

> "However, this Court may wish to withhold action pending decision in *Holland* v. *United States,* No. 37, in view of the similarity of two of the minor points raised, *supra,* p. 21, to issues in the *Holland* case."

The similarity between the issues of the *Holland* and present cases cannot be characterized as minor.

A decision in the *Holland* case favorable to the Government would fall far short, however, of disposing of the present case. The present case presents a question of cardinal importance not raised by the *Holland* case. In *Holland,* the Government offered definite evidence as to bank balances and stock ownership, fixing the taxpayer's net worth at the start of the alleged tax evasion year. (See *Holland* Record, 181). In the instant case, as we shall show in Point II, the Government offered evidence of a far more tenuous nature in an effort to fix petitioner's net worth at the start of the alleged tax evasion year.

II

(a) The Courts of Appeal have lately determined a number of cases involving the net worth method of proof of alleged income tax evasion. Their decisions have developed no consistent theory as to the quantum of evidence by which the Government must establish net worth at the starting point. The United States, in applying for review of *Calderon* v. *United States,* 207 F. 2d 377 (C.A. 9, 1953), has conceded that the decisions cannot be harmonized. This Court has recognized the importance of

the problem and the conflict of decisions, and has granted review of a series of cases.*

The instant case is one particularly requiring review because it presents a problem not present in any of the other cases now pending before this Court. In all of them, we believe it to be true that the Government presented some definitive evidence of the net worth of the taxpayer at the start of the alleged tax evasion year. Here, it did no such thing, but instead resorted to a technique which seriously aggravates the general problem of protecting a taxpayer's rights.

The entire evidence on petitioner's net worth at the start of the tax evasion year was presented in the following form: the special agent testified (1) that petitioner furnished him at the first major interview with his net worth statement as at January 1, 1943 (which net worth statement was received in evidence); (2) that at further interviews the petitioner was handed reconstructed net worth statements (never offered in evidence) prepared by the special agent for the end of 1943, 1944, 1945 and 1946, the alleged tax evasion year; (3) that these net worth statements were tentative computations made for purposes of the interviews; and (4) that petitioner had not explained the existence of errors in these tentative computations to the satisfaction of the agent.

The Government thus never offered any form of definitive proof as to petitioner's net worth at the start of the tax evasion year. Even petitioner's statement as to his

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* In addition to the *Holland* case and the *Calderon* case (No. 25, October Term 1954), review has been granted in *Friedberg* v. *United States*, No. 18 (from the Sixth Circuit) and *Smith* v. *United States*, No. 52 (from the First Circuit). Petitions requesting review are pending in at least *McFee* v. *United States*, No. 15 (from the Ninth Circuit); *Banks* v. *United States*, No. 13 (from the Eighth Circuit; and *Goldbaum* v. *United States*, No. 12 (from the Ninth Circuit).

net worth (if sufficient in the absence of independent corroboration; *Cf. Calderon* v. *United States, supra*) antedated by three years the start of the alleged tax evasion year. The Government endeavored to substitute, for proof of net worth at the start of the tax evasion year, the testimony of the special agent that petitioner's explanations to tentative compuations, with which he was confronted at interviews, were not satisfactory.*

There was another wide gap in the Government's presentation. Petitioner's net worth was almost entirely reflected in his interest in a mercantile partnership which he commenced with his wife in January 1943. The Government made no effort, and presented no testimony, on the starting point net worth for petitioner's wife and partner. This was particularly necessary in that petitioner's partner was his second wife whom he married in November 1941 (R. 258), and whose earlier financial history, and ability to provide funds for the partnership, was not covered by any evidence offered by the Government.

This case thus presents more sharply than any case now pending before this Court, not only the amount of evidence necessary to establish a starting point net worth, but the validity of the prosecutive technique employed. This case highlights the dangers against which the Court of Appeals for the Fifth Circuit warned in *Demetree* v. *United States,* 207 F. 2d 892 (1953) in saying that, in this type of case (p. 893),

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* The Government brought forward a number of witnesses who testified as to petitioner's assets as at the end of the alleged tax evasion year, and whether he held these assets at the start of the alleged tax evasion year. No possible case of a large or unexplained increase in net worth was made out from their testimony. Petitioner's assets in his home and his stocks were the same (R. 50; R. 48). His assets in bonds were down about $400 (R. 54; Ex. 55, R. 391). The sum of his bank accounts was up about $1900 (R. 30, 34, 36); his car valued at $1200 was sold during the year (R. 97).

"there is danger of the case being tried on a theory which, keeping to the ear the promise that a defendant is presumed innocent until his guilt is established beyond a reasonable doubt, breaks it to the hope by allowing a series of theoretical estimates and computations as to defendant's income to take the place of proof of it. - - -

Sometimes, without adhering to the essentials of the method, that the net worth at the beginning as well as the end of the period be shown, the proof comes in and the case is submitted with a complete gap in the proof as to the beginning of the period."

The Court of Appeals continued (p. 894) that, after the Government introduces proof of deposits, expenditures, etc., and "having put up what it calls a *prima facie* case, the defendant finds himself jockeyed out of the position the law affords him, of insisting that the Government establish his guilt by legal and credible evidence beyond a reasonable doubt."

The instant case carries the prosecutive technique one step beyond that envisioned and criticized by the Court of Appeals above. Here, no effort was made to establish in court a *prima facie* case by proof of assets as at the start of the alleged tax evasion year. The special agent simply testified that he confronted petitioner in interviews with tentative computations of net worth which the petitioner did not explain to his satisfaction. Petitioner's inability to explain at interviews what the Government conceded were tentative computations of net worth is thus substituted for proof of net worth at the starting period.

The length to which the prosecutive technique was employed in this case furnishes, of itself, an adequate ground for review.

(b) The opinion below is in clear conflict with the decision of the Ninth Circuit in the *Calderon* case where the

Court held that the Government must bear the burden of proving each pertinent starting item of the net worth statement to a reasonable certainty and that, in the absence of independent proof, the extra-judicial statements of the defendant are not competent or admissible to establish the starting item of net worth statements. See also *United States* v. *Chapman*, 168 F. 2d 997, 1001 (C.A. 7, 1948), certiorari denied, 335 U. S. 853, where the Court agreed that "In a net worth case, the starting point must be based upon a solid foundation and a Revenue Agent's statement of the defendant's oral admission or confession when uncorroborated is not sufficient to convict."

(c) There are other phases of the decision which are in conflict with the decisions of the Courts of Appeal for other circuits. The Courts of Appeal have recognized the need for caution in a criminal case rested on the net worth theory. See, *e.g.*, *Bryan* v. *United States*, 175 F. 2d 223, 226 (C.A. 5, 1949) affirmed 338 U. S. 552; *United States* v. *Fenwick*, 177 F. 2d 488, 490 (C.A. 7, 1949). The trial courts instruction on net worth (R. 341) merely defined and explained the theory of a net worth case, and uttered no word of caution that it was necessary for the Government in such a case to establish a starting point net worth. His only reference to the necessity of a starting point net worth is included in the following sentence (R. 340-341):

> "The Government, ladies and gentlemen of the Jury, is authorized by law when the books are found to be inadequate to adopt a reasonable method of ascertaining income, and, so, in this case it has undertaken to find what the defendant was worth at the beginning of the year and what he was worth at the end of the year so as to show what he had accumulated during the year."

(d) Furthermore, the instructions of the trial court, upheld by the Court of Appeals, defined a reasonable doubt as the "kind of thing, - - - that you folks in the course of

your lives with respect to the ordinary affairs of life and perhaps of more serious important nature might be willing to act upon." (R. 339). This is virtually the identical instruction given by the same trial court in the *Holland* case, and called into question there. See Petitioner's Brief, pp. 52-53, in *Holland* v. *United States*, No. 37, October Term 1954. Taken at its best, the instruction is meaningless unless reversed. There appears to be no warwant for an instruction of this character.

III

It would be timely for this Court to consider the problem of proper limits on the comments and actions of the trial court. In lieu of characterizing them, a listing of some of the more flagrant comments are given in Appendix C. In proceedings out of the hearing of the jury, the trial judge expressed the views that "I have never seen a worse income tax case than this one" and that "If it were a civil case, I would direct a judgment in favor of the Government. In a criminal case I cannot do it." (R. 212). An examination of the trial judge's many comments during the trial indicate that he gave free rein to his private opinions and so dominated the conduct of the trial as to deprive petitioner of a free and unfettered trial by jury.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 7, 1954

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APPENDIX A

United States Court of Appeals

TENTH CIRCUIT

No. 4808—May Term, 1954

IRVING M. RUBENSTEIN, also known as Irving M. Ruby,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court
for the District of Colorado

(August 4, 1954.)

Isaac Mellman (Gerald N. Mellman with him on the brief), for appellant.

Donald E. Kelley, United States Attorney, and Clifford C. Chittim, Assistant United States Attorney, for appellee.

Before Phillips, Chief Judge, Pickett, Circuit Judge, and Kennedy, District Judge.

Kennedy, District Judge.

The appellant, as defendant in the court below, was indicted for violation of 26 U.S.C., 145(b), for the attempt to evade and defeat income taxes, and for violation of 26 U.S.C., 3793(b)(1), for aiding and assisting in the prepa-

ration and presentation of a false and fraudulent return, the latter charge referring to the personal return of the defendant's wife, Zelda Rubenstein. The appellant and his wife were engaged in a copartnership, out of whose operations the controversy in this case arises.

The cause was tried to a jury, resulting in a verdict of guilty on both counts, upon which the defendant was sentenced to pay a fine of ten thousand dollars upon each count and have execution therefor and to imprisonment for a period of three years upon each count of the indictment, the term of imprisonment on such counts to run concurrently. The appeal here is from such sentence and judgment.

The points upon which appellant bases his charges of error by the trial court are eight in number, which in abbreviated form are as follows: (1) the Court erred in denying the appellant's motion for a bill of particulars; (2) the trial Court did not properly define "willfully" and "knowingly" as contained in the statute; (3) there was not sufficient evidence presented showing that the appellant aided and assisted in the preparation of the false returns of his wife; (4) there was not a proper instruction to the jury that from a proven situation the tax followed as a matter of law; (5) the jury was not properly instructed upon the essential elements of proof required to be established under the net worth theory; (6) the Court failed to instruct the jury upon the elements of the crime charged in each count of the indictment; (7) the Court erred in admitting certain exhibits on behalf of the government; and (8) the comments and actions of the trial Court were such as to prejudice and inflame the jury against the appellant so as to prevent him having a fair and impartial trial.

As to points 1, 2, 4, 5, 6 and 7 it would plainly appear that these alleged errors have been fully and completely

ruled adversely to the appellant either jointly or separately by this court in the cases of Holland v. United States, 209 F. 2d 516, and Hooper v. United States, 213 F. 2d 30, which, together with the cases cited in those opinions, make it seem unnecessary to further add to the legal literature of the Circuit upon the subjects therein discussed.

As to the point that the Court erred in refusing a bill of particulars it might be mentioned that in addition to such matter being largely within the discretion of the trial judge as stated in the above cited cases, the record shows that the appellant upon two different occasions voluntarily appeared before revenue agents and fully discussed his returns as to his own figures and theirs concerning his 1946 return and those of previous years so that in advance of the trial he was fully advised as to the nature of the government's claim, thereby eliminating any element of surprise upon the trial.

Concerning point 8—that the attitude of the trial Court was such as to prejudice and inflame the jury against the appellant so as to prevent him from having a fair and impartial trial—the record seems to disclose more than the ordinary activity of the trial judge in the taking of the evidence, but it likewise shows that it was apparently inspired by the desire of the judge to expedite the trial rather than to take sides with either the plaintiff or the defendant. The principal complaint of the appellant accentuated along this line is with regard to the attitude of the Court criticizing a witness and counsel involving testimony of a brother of the appellant who testified that the appellant handed him a sealed envelope and told him that there was money in it. The Court informed the witness that his testimony in regard to what the appellant told him was hearsay and should be excluded and the witness either having misunderstood or in attempting to get the matter of the money being in the sealed envelope before the jury again attempted to repeat this testimony. The trial

judge in a very firm manner criticized the witness and counsel in which he was undoubtedly justified for it was inadmissible as hearsay and if allowed to stand would be prejudicial to the appellee's case.

While counsel for appellant complains bitterly of the attitude of the Court in showing prejudice against the appellant, the record shows that the trial was conducted in a manner which is in general harmony with the statement made by this Court in the case of Inland Freight Lines v. United States, 191 F. 2d 313-316:

> • • • "The trial court is not a mere moderator. The court has the power and is charged with the duty of directing the trial along paths of recognized procedure in a manner reasonably calculated to bring about a just result."

This view is substantially strengthened by the instructions of the Court which undoubtedly disabused the minds of the jury of any idea they may have had of any prejudice against the appellant or his counsel when he said:

> "Ladies and gentlemen of the Jury, sometimes folks in the Courtroom during the course of a trial think they see in what the Judge does or says an indication of the Court's views of the facts or of the remarks of counsel in the case. The Court charges you, ladies and gentlemen of the Jury, that you are to disregard wholly and to lay out of your consideration in this case all such considerations, if you think there were any, for, ladies and gentlemen of the Jury, the Court has not intended to give you any such indications, and, moreover, ladies and gentlemen of the Jury, you are the sole judges of the questions of fact in this case bearing upon the guilt or the innocence of this defendant."

There remains for consideration point 3 based upon the second count of the indictment to the effect that there was no evidence presented to the jury that the appellant aided and assisted in the preparation of the wife's income tax

return for the year 1946. In this respect the record shows that this return of the wife was prepared by an accountant (Ginsberg) and was made up from the partnership returns representing cash which she had received during the year from that source. Upon that phase of the question this appears to be by itself a true report of what she did receive through the operations of the partnership and therefore cannot be considered as a false report but if it should be considered as a false report, in order to connect the appellant it would be necessary to show that he had a criminal agency in causing such report to be made as a false report rather than reflecting a true return of what the wife-taxpayer received from the partnership during the taxable year; but in addition an examination of the record shows that the accountant who made up the return testified that he made it up from the partnership return and that he did not get information from any other source except to say that "if there were any other I would have to get it from Mr. Rubenstein". Neither at this time, as found in the printed record at page 62, nor at another time when he was questioned, as shown by the record on page 221, did he affirmatively say that he got any information in regard to the return of the wife from the appellant. Under both of these situations it is indeed questionable if there is sufficient evidence to show that the defendant was guilty under this count beyond a reasonable doubt; first, because the report made for the wife was evidently a true report as made up from the partnership records, and second, because the evidence is clearly insufficient to show that the appellant had anything to do with the action of the accountant in making up such return.

For the reasons stated the sentence and judgment of the Court upon the first count of the indictment should be and is affirmed and upon the second count should be and is reversed.

APPENDIX B

The following reflect some of the challenges to the Government's tentative net worth computations which Petitioner made or errors in some of the assumptions made:

(1) As reflecting the interest of the partners in the partnership, the Government accepted the figures supplied by Petitioner's accountant and set forth in Exhibits 28-31 (R. 369-379). These figures showed the partnership interest as at December 31, 1945 as $49,466.66, and the interest as at December 31, 1946 as $64,517.44. The Government's special agent subtracted from the 1945 figure the amount of $1,051.31, and testified that partnership net worth at the end of 1945 was $48,415.35. The $1,051.31 deduction derived from its 1946 investigation when it was concluded that income for the three years 1943 through 1945 was over-reported by this amount. (See, *supra* p. 8). Manifestly, there is no basis or fairness for deducting this item as a conclusion of the 1946 audit when this audit was deprecated and not accepted for any other purpose. (R. 152-153).

(2) In arriving at expenditures, the tentative computations charged Petitioner and his wife with having paid $5,707.24 in federal income taxes in 1946 (R. 107, 401). Actually, this figure represented tax liability for 1946 and $562 of this amount was paid in 1947 (R. 123). The tax expenditures figure should have been reduced by this amount to $5,145.24.

(3) The tentative computations assumed Petitioner and his wife reported net income for 1946 of $24,415.43. (See R. 401; 107). Actually, this was the net income report of the partnership (Ex. 1, R. 347). Petitioner and his wife each reported half of the partnership income as their income in 1946 but to Petitioner's income tax return was

added $143.50 as dividends received (Ex. 9, R. 357). This sum should obviously have been credited to him to decrease the asserted spread between reported income and income as reconstructed by net worth calculations.

(4) Among the expenditures charged to Petitioner as a nondeductible expense for 1946 was the sum of $3,196.20 paid to O.P.A. (R. 401, 107). Petitioner testified that he settled a dispute with O.P.A. and believed he was entitled to deduct the amount of the settlement (R. 312-313). The special agent's testimony was that Petitioner told him he "settled for this penalty" and so he deemed it an O.P.A. penalty "and I still don't believe it is a deductible item" (R. 124-125). Here is a clear instance of the Government's trial technique and the manner in which it sought to shift the burden of proof to Petitioner. There was a complete failure of proof by the Government that the amount paid was a non-deductible penalty. If the $3,196.20 payment was not a "penalty" but was deductible as a business expense, the alleged unreported income figure would be reduced *pro tanto* (R. 146).

(5) At the second interview, the special agent presented Petitioner with a schedule of his personal non-deductible expenditures for the year 1946. Petitioner agreed to the figures and certified the correctness of the schedule. (R. 98; see Ex. 49, R. 385). The schedule computed his living expenditures as $9,659.84 for 1946. Petitioner was later to contend this schedule was far too high. In 1946, Petitioner and his wife lived very modestly in a "moderately furnished" home which cost $10,270, owned no automobile, took no long trips or vacations, and did not entertain very much (R. 273).

(6) Petitioner's wife had considerable amounts of nonreportable income which were not given effect in the tentative net worth computations. She received about $37.50 from her first husband for support of their child (R. 267,

277). She also received gifts from her mother (R. 267) and she cashed a matured life insurance policy of approximately $250 during this period (R. 268). A brother repaid her a loan of $1,000 during this period (R. 268).

The total of the tangible items above is $8,153.01. The special agent's final conclusion was that his tentative net worth computations showed an unexplained increase in 1946 of $14,616.42. If the gifts to petitioner's wife from her mother (given monthly, R. 267) plus the overstatement of petitioner's living expenses were $6,463.41, no alleged increase in net worth would remain, even under the special agent's theory.

APPENDIX C

The following represent extracts from the record, disclosing the comments and actions of the trial judge believed to have been such as to prejudice and inflame the jury against the petitioner and to prevent his having a fair trial. Where necessary to illuminate the comment or action, the context is stated parenthetically.

1. Petitioner's accountant was called as a witness by the Government. Cross-examination of the witness by petitioner's counsel was interrupted six times by the trial court (R. 64, 65, 66 (two places), 67 (two places)). Although Government counsel did not object, the trial court intervened that the cross-examination was "way outside the scope of the direct examination" (R. 66), was "improper cross-examination (R. 67), or was "a matter of just ordinary common sense" (R. 67).

2. The trial court undertook his own examination of witness Zellinger (R. 70), asking why petitioner took certain action, what his reasons were, and what explanation he gave (R. 72). The court's examination was clearly intended to elicit statements detrimental to petitioner.

3. Witness Siegal was examined by the court for some four record pages in a manner clearly intended to elicit statements detrimental to the petitioner (R. 77-80).

4. Special agent Zeldin of the Internal Revenue Service (R. 93) provided the Government's testimony on petitioner's alleged net work. Cross-examination of this witness by petitioner's counsel was constantly interrupted by the court who shielded the witness and harrassed petitioner's counsel. Excerpts from the cross-examination include the following:

(a) The trial court interjected at the conclusion of the first cross-examination question and the following colloquy occurred (R. 114-115):

> "The Court: No, he didn't say anything of the kind.
>
> He said he had looked at that one item only and didn't find it on that. He pays particular attention to every year in all those schedules. He hasn't stated to the contrary.
>
> Mr. Gelt [petitioner's trial counsel]: Well, I'm sorry I misunderstood. May I have the reporter read that last question and answer he had before?
>
> The Court: You just examine the witness. You heard it as well as I did.
>
> Mr. Gelt: Well, I want to base my next question on what he did say, and I want to know—
>
> The Court: You just ask him and he will tell you again. * *
>
> Mr. Gelt: Can't we settle it by having the reporter read it?
>
> The Court: You go ahead and ask the question. What difference does it make?"

(b) "Q. I am just asking about Lawrence and Joyce Ruby.

The Court: They are the same.

Mr. Gelt: That isn't what he said before. He said Lawrence or Buddy—

The Court: Mr. Gelt, are you arguing with the Court? This witness has stated his understanding was that Lawrence and Buddy were one and the same individual.and said Buddy is a nickname. That is what he said.

Mr. Gelt: Now,—

The Court: Isn't that the case? Let's get that straight.

Mr. Gelt: I think it is, your Honor.

The Court: Yes. Now, the next time you undertake to argue with the Court refrain from it until you know what you are talking about." * (R. 115)

(c) "Q. Now, just please answer the question.

The Court: He is answering the question." (R. 116)

(d) (On cross-examination of the special agent based on the notes from which he testified):

"The Court: Now, if you have anything in those documents—we'll bring this to a conclusion quickly—if you want to receive any of these in evidence, we'll receive them, let the full statement of this officer which he made at the time of the interview, go to the jury. You're talking about divulging the fact. Let's divulge them all, if there are any facts." (R. 117)

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* The testimony was that petitioner had a son (Lawrence, nicknamed Buddy) and a daughter (Joyce) (R. 113). The trial court was wrong in intervening to say that Lawrence and Joyce were the same individual.

(e) "Q. Now, Mr. Zeldin, you are under duty, are you not, to divulge all of these—

The Court: Now, let's not labor that point any longer. Of course he is. As a matter of fact, that is a question of law. The Court takes judicial notice that this man is an employee of the United States and what his duties are and there is no issue in this case about it. Now, go ahead with your cross examination." (R. 117)

(f) "Q. That's right. Now, Mr. Zeldin, why did you withhold that from the jury and the Court?

The Court: He didn't withhold anything. Now, I'm not going to permit counsel, by implication or directly, to charge any agent of the United States with wrongdoing. They are not on trial here. Now, he has already told you that he didn't discuss that here because there was no discrepancy in that year between what Mr. Ruby reported and what the agent found.

Mr. Gelt: He did mention all of the figures, your Honor, and he stopped just short—

The Court: Well, what I'm suggesting to you is, don't attempt to try the agent. The man who is on trial here is Mr. Ruby.

Mr. Gelt: I do believe I have the right to cross examine the agent.

The Court: Yes, you do, but go ahead. Quit charging him with offenses against the United States. There is no evidence he did." (R. 118-119)

(g) "The Court: Now, I asked you, counsel, to have that marked if you wanted it in evidence, and offer it if you desire. I don't think it is proper to read these things in detail until they are in evidence.

Mr. Gelt: Well, I don't believe that I should be put in the position of having government exhibits put in evidence.

The Court: I'm not putting you in any position, at all. You were making some claim a little while ago

that the agent had failed to disclose facts that were important in this case which you claim were in these reports. Now, in order to clarify that, if there is anything in here that you think he has failed to disclose, the way to get it in is have the exhibits marked and offer them and let the jury hear the whole story." (R. 119-120)

(h) "The Court: That is about the fourth time he has told you. Go ahead. Drop that." (R. 125)

(i) "The Court: Now, then, you are arguing with the witness. Cross examine him." (R. 125)

(j) "Q. Mr. Zeldin, won't you please answer the question? Your counsel will give you plenty of opportunities to explain.

The Court: All right, Mr. Witness, you were trying to answer and counsel interrupted you." (R. 126)

(k) "The Court: Now, I think I see where you're going, counsel, and it's wholly immaterial to the case." (R. 130)

(l) "The Court: Well, now, what difference does that make in this lawsuit?" (R. 137)

(m) "The Court: Well, then, this is outside the scope of the direct examination." (R. 140)

(n) "The Court: What difference does it make? It is completely outside the scope of the direct examination." (R. 143)

(o) "Q. Pardon me, Mr. Zeldin—

The Court: Go right ahead, Mr. Witness.

Mr. Gelt: We object to the witness giving reasons which he has in his mind.

The Court: Objection overruled. Go ahead and tell us about that. You opened it up." (R. 143-144)

(p) "Mr. Chittim: May it please the Court, I think this is irrelevant.

The Court: Sustained. We might start trying this lawsuit pretty soon, Mr. Gelt." (R. 145)

(q) "The Court: Oh, that is entirely speculative. You needn't answer that.

Q. If there were any other—

The Court: Nothing in evidence in this case at all that any of those facts you are assuming are true." (R. 146)

(r) "Mr. Chittim: If the Court please, I think that is also irrelevant.

The Court: Sustained.

Mr. Gelt: May it please the Court—

The Court: I don't care to have it argued." (R. 148)

(s) "Mr. Chittim [Government's Attorney]: If the Court please—

The Court: The objection is sustained. Depend entirely on what he did with them." (R. 149)

(t) "The Court: That is the same question. Sustained.

Q. Mr. Zeldin, under those circumstances—
The Court: Now, don't ask that question. I have let you ask it twice.

Mr. Gelt: Very well. No further cross examination." (R. 150)

5. Louis Rubenstein, petitioner's brother (R. 228), testified that petitioner had given him envelopes to keep. Under cross-examination by the Government's attorney, the following occurred (R. 231):

"Q. How were they put—who put them in the safe, and under what circumstances?—A. My brother handed me these envelopes and asked me to keep them for him, told me at that time, and told me at that time there was money in the envelopes.

The Court: I will say to you, Mr. Ruby, if you do that, I am going to send you over to the County Jail.

The Witness: I am awfully sorry, but I thought I was answering the question.

The Court: I have admonished you in the plainest possible terms. I have ordered you not to do that."

6. Further remarks of the trial court include the following:

(a) "The Court: Well, go ahead. I don't think it has any probative value. If the jury thinks it has they may take it into account." (R. 165)

(b) "Q. And what did Mr. Ruby say?—A. He said he was willing to so swear.

The Court: Are you going to put the defendant on the stand?" (R. 165)

(c) "Mr. Gelt: * * *. I haven't any idea how long Mr. Ruby will take. It will be rather lengthy.

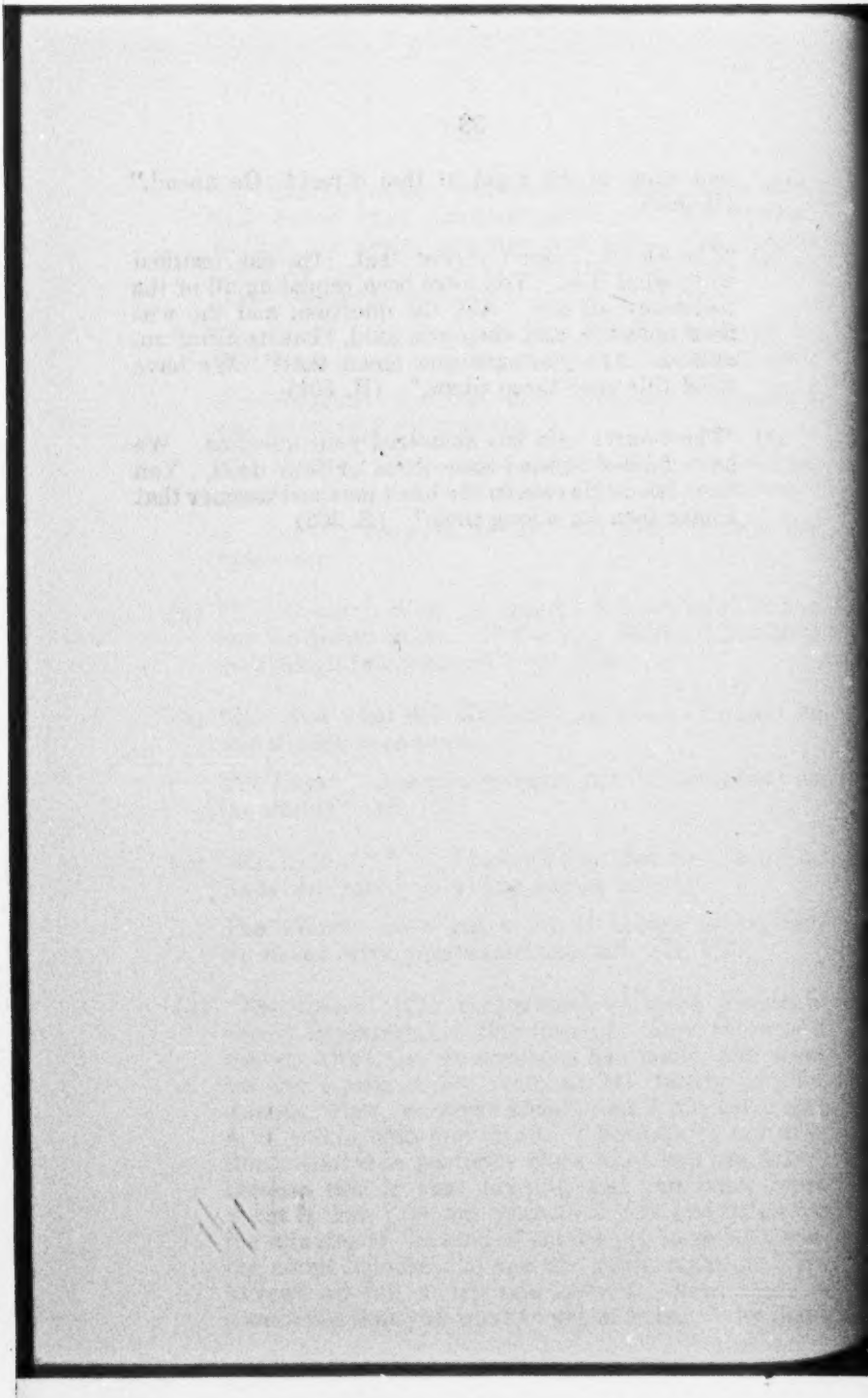
The Court: He's got a lot of things to explain. Go ahead with your examination." (R. 166)

(d) "The Court: The background of these people is wholly immaterial in this lawsuit. Now, there is a charge which the Government has made, and what we are trying is the truth or the falsity of that charge. Now, go right ahead, and I am not going to interfere with you at all. I hesitate to say anything until it is perfectly clear what you are doing, because this is your lawsuit, and you know more about it than I do, but when I sit here and listen for ten minutes to the kind of things you have been asking about it looks like you are going right on. We haven't all fall to try this lawsuit. Now, there is something that you want to get at here. Why don't

you want to get right at that direct? Go ahead." (R. 260)

(e) "The Court: Don't repeat that. He has testified as to what it is. You have been repeating all of the testimony all day. Ask the question, and the witness answers, and then you said, 'You testified so-and-so. Are you sure you mean that?' We have tried this case three times." (R. 304)

(f) "The Court: He has answered your question. We have fiddled around here three or four days. You have tried this case in the most inexpert manner that I have seen for a long time." (R. 305)



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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 393

IRVING M. RUBENSTEIN, ALSO KNOWN AS IRVING M. RUBY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 19–23) is reported at 214 F. 2d 667.

JURISDICTION

The judgment of the Court of Appeals was entered August 4, 1954 (R. 446), and a petition for rehearing was denied September 1, 1954 (R. 460). On September 24, 1954, by order of Mr. Justice Reed, the time for filing a petition for a writ of certiorari was extended to October 7, 1954. The petition was filed October 7, 1954. The juris-

diction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED

1. Whether there was sufficient evidence to establish petitioner's net worth at the beginning of 1946 with reasonable certainty.

2. Whether petitioner was deprived of a fair trial by the comments of the judge.

STATUTE INVOLVED

INTERNAL REVENUE CODE OF 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

STATEMENT

On March 12, 1953, a two-count indictment was filed against petitioner in the United States Dis-

trict Court for the District of Colorado, the first count charging him with wilful attempted evasion of his own income taxes for the year 1946, in violation of Section 145 (b) of the Internal Revenue Code, and the second charging that he had aided in the preparation and presentation of a false income tax return for his wife for the same year, in violation of Section 3793 (b) (1) of the Internal Revenue Code. (R. 5–6.) After a jury trial petitioner was found guilty as charged. (R. 19–20.) On October 30, 1953, he was sentenced to concurrent terms of imprisonment for three years on each count and fined $20,000. (R. 20–21.) The Court of Appeals affirmed the conviction on the first count, but found the evidence of petitioner's connection with his wife's return insufficient and reversed as to the second. (Pet. 19–23.)

The evidence to support the conviction on Count One may be summarized as follows:

From 1943 to 1947 petitioner and his second wife owned and operated the Ruby Sales Company, a partnership dealing in wholesale novelty merchandise. The business was conducted on a nation-wide scale with gross sales in excess of $600,000 during 1946. Petitioner was the "chief boss" and did most of the traveling, buying, and selling, while his wife managed the store. (R. 289–290, 320, 371.) Both the partnership income tax returns and the individual returns of petitioner and his wife were prepared by an accountant who derived his information from the part-

nership books and from petitioner himself. (R. 58–62, 65, 220–221.) The figures in the 1946 partnership return, which was used as the basis for the individual returns, coincided with the figures in the books. (R. 58.)

A revenue agent began an investigation of the partnership books in March 1948. (R. 193.) He discovered that seventeen checks, totaling about $3,300, which had been given to petitioner during 1946 for goods sold by the Ruby Sales Company, had not been recorded in the books. All had been cashed by petitioner. (R. 83, 155–157, 303–307, 381–382). On April 28, 1948, the revenue agent asked petitioner for permission to examine his safe deposit box. After excusing himself for about two hours, petitioner took the agent to the bank and showed him the box, saying, "See, I have nothing to hide." It was later discovered that petitioner had visited the box during the two-hour interval. (R. 158–160.)

The agents held numerous conferences with petitioner, his attorney, and his accountant. (R. 94–111, 170–175.) After the investigation had been in progress for about a year, a two-day conference was held on February 28 and March 1, 1949. Petitioner presented an affidavit setting forth his net worth as of January 1, 1943. He stated that he had had $30,400 in currency at that time, and that, through gradual disbursement of this fund, he had the following approximate amounts remaining at the beginning of the suc-

ceeding years: 1944, $27,000; 1945, $11,000; 1946, $8,000; 1947, $2,000. When it was pointed out that this claim sharply conflicted with his sworn statement in a divorce action against his first wife, he said that he had concealed his currency from the divorce court. His attention was called to several of the checks which did not appear in the books, and he explained that he had cashed them to reimburse himself for expenditures from his personal funds on behalf of the partnership. Upon the basis of an examination of cancelled checks issued by petitioner and his wife, the agents had drawn up a schedule of personal non-deductible living expenses for 1946 in the total amount of $9,659.84. Petitioner, after examining the schedule, certified that it was correct.[1] (R. 94–102, 113–116, 121–122, 382–390.)

On March 21, 1949, three weeks after the previous conference, petitioner, accompanied by his accountant and his attorney, again met the agents in order to verify the Government's tentative net-worth computation for the years from 1943 through 1946. All the items uncovered by the agents' investigation were thoroughly discussed. The second Mrs. Rubenstein's assets were included in the computation along with petitioner's. Petitioner's previous statement as to cash on hand was accepted by the agents, and a number of

[1] At a later date petitioner said he thought the amount was too high, but after a reexamination of the schedule he again conceded its accuracy (R. 171).

other minor corrections suggested by him were incorporated. Despite these concessions, there still remained unexplained net-worth increases of approximately $9,000 for 1943, $16,000 for 1944, and $14,600 for 1946. Petitioner was unable to account for this apparently unreported income. (R. 102–109.)

In May, and again in June, 1949, petitioner told the agents that he had frequently padded his expense accounts during the 1943–1946 period, his purpose being to obtain money from the business for the children of his former marriage without the knowledge of his present wife. (R. 109–111.) In December 1949, however, he stated that the amount of padding was insignificant, and that the real explanation of the net-worth increases must lie in the fact that, frequently using personal funds for the benefit of the partnership and reimbursing himself with receipts from sales which were not recorded in the books, he probably had appropriated more of the partnership receipts than he should have in the confusion of the war years. At the same time he altered his story as to cash on hand and explained that he had spent all but $18,220 of the original accumulation of $30,400 by the end of 1943, and had exhausted all the remainder by the end of 1944.[3] (R. 170–173.) Finally, on May 28, 1952, petitioner told the

[3] The effect of this was to eliminate any unexplained net-worth increase for 1943, as to which year the period of the statute of limitations was about to expire.

agents that he believed his income must actually have been correctly reported for the year 1946 and that the errors must have occurred in 1945, as to which year the Government's computation showed no unexplained increases. The explanation given was the confusion of war-time and a poor bookkeeper in 1945.[3] (R. 173–175.)

The revenue agents conducted a long and thorough independent investigation of the annual increases in the net worth of both petitioner and his wife from the beginning of 1943 to the end of 1946. Numerous customers were interviewed and thousands of transactions of the Ruby Sales Company were examined. (R. 147, 169.) At the trial there was evidence, over and above petitioner's extra-judicial admissions, to establish every essential item in the computation which was the final result of the agents' labors. Petitioner himself took the stand and confirmed the accuracy of the figures used by the Government at the starting point of the computation, January 1, 1943. (R. 287–288, 316–317.) The proof of the other items is summarized in tabular form, with supporting record references for each item, in the Appendix, *infra*, pp. 18–19.[4] It will be observed that

[3] On the date of this explanation the period of the statute of limitations had expired as to the year 1945.

[4] A practically identical chart, to which reference is made in the petition (p. 8, footnote), was used by the Government in the Court of Appeals; and we are informed that the essence of this chart was used by the

petitioner was given credit for the full amount of cash claimed at the starting point, $30,400, and for all other items which he specifically claimed during the course of the investigation. Notwithstanding this, the final computation shows that, while petitioner and his wife had an actual income of $47,448.76 in 1946, they reported only $24,558.93, leaving an unreported total of $22,889.93.[5]

In addition to confirming the starting point of the Government's computation, petitioner in his own testimony admitted that he had padded his

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prosecutor in summarizing the evidence for the jury. Normally the Government presents such a computation based on the evidence through an expert witness. But this case was tried by the same District Judge who had tried *Holland* v. *United States*, 209 F. 2d 516 (C. A. 10th), certiorari granted, 347 U. S. 1008, No. 37 this Term, argued October 20 and 21, 1954. And the Government was represented by the same Assistant United States Attorney. In the *Holland* case the trial judge refused to permit the Government to present the computation through an expert witness and told the prosecutor that he could state the results of the investigation in his arguments to the jury. See our brief in the *Holland* case, pp. 11–12, footnote 7. The prosecutor, therefore, followed the same procedure here.

[5] The figures do not take into account the standard deductions, claimed by petitioner and his wife (R. 359, 363), and are subject to minor and immaterial adjustment to allow for these.

The tentative computation which was presented to petitioner during the investigation (*supra*, pp. 5–6) showed unreported income of only approximately $14,600. That computation took into consideration petitioner's original story of a gradual disbursement of his cash hoard of $30,400, with some of this amount still available in 1946.

expense accounts to a certain extent, though denying a tax evasion motive. (R. 312.) He also admitted that he had frequently reimbursed himself for personal expenditures by cashing checks payable to the partnership; that none of these checks had been entered in the partnership books; and that memoranda he had kept of these transactions had been destroyed. (R. 303–307, 310–311, 313–314.) He did not tell his accountant because "It didn't concern him. It don't go on the company records. Why should he be bothered about it?" (R. 324.) He admitted the possibility of unreported income, but denied that it was intentional. (R. 319, 322.) At no time did he challenge the accuracy of any specific item in the Government's computation.

In arguing the motion for judgment of acquittal defense counsel admitted that the evidence showed some unreported income, but argued that the Government had not proved willful intent to file a fraudulent return. (R. 329.)

ARGUMENT

The petition attempts to raise issues similar to those presented by the so-called "net-worth" cases now pending before this Court. But the attempt is defeated by the record; for whatever problems of proof there may be in establishing unreported income by net-worth computations, such problems are without significance in a case where, as here, the fact of unreported income is

actually conceded by the defendant. Net-worth computations are used, as the Court knows, only to show increased wealth, and it is necessary to show, in addition, (1) that the increase is traceable in whole or in part to unreported income and (2) that the failure to report such income was intentional. In the cases upon which petitioner relies[*] the fact of unreported income was in issue at the trial; in both cases the defendants laid claim to prior accumulations of cash, which, if established, would have accounted for most of the increases which the Government ascribed to current unreported income. No such circumstances appear in the present record. The Government credited petitioner with the full amount of cash he claimed at the starting point, and the fact of unreported income for 1946 was so clearly proved that it was conceded by defense counsel. (R. 329.) The critical issue in this trial was petitioner's intent, and the case is obviously an inappropriate one for a discussion of the issues which petitioner now, for the first time, seeks to raise. In any event the attack upon the Government's net-worth computation is wholly without merit.

1. Although there was proof of specific items of unreported income for 1946 (i. e., proof of

[*] *Holland* v. *United States*, *supra*; *Calderon* v. *United States*, 207 F. 2d 377 (C. A. 9th), certiorari granted *sub nom. United States* v. *Calderon*, 347 U. S. 1008, No. 25 this Term, argued October 21, 1954.

unreported income without reference to the proof of net-worth increases) in the amount of $3,300 (*supra*, p. 4), which would alone have been sufficient to sustain petitioner's conviction, the Government relied primarily upon a computation of the annual increases in the combined net worth of petitioner and his wife from January 1, 1943, to December 31, 1946, which established an unexplained increment of about $23,000 for the year 1946.[1] Petitioner does not challenge the accuracy of the starting point of this computation on January 1, 1943. He cannot, for he expressly con-

[1] Since the profits of the partnership were to be divided equally (R. 63), it might be supposed that one-half of this sum was attributable to petitioner's wife, and it was upon this theory that petitioner was indicted both for evading his own income taxes *and* for procuring a false return for his wife (R. 5–6). However, the wife testified that her return correctly reported all the income she received from the partnership (R. 266), while petitioner testified that he was secretly withdrawing partnership funds for the benefit of the children of his first marriage (R. 301–302). Such withdrawn funds would constitute income to petitioner (see *Rutkin* v. *United States*, 343 U. S. 130; *Briggs* v. *United States*, 214 F. 2d 699 (C. A. 4th), certiorari denied October 25, 1954, No. 306 this Term; *Marienfeld* v. *United States*, 214 F. 2d 632 (C. A. 8th), certiorari denied October 25, 1954, No. 311 this Term), and the Court of Appeals, consequently, being of the opinion that the wife's return was probably a correct account of her income, reversed the conviction on the second count. If the Court of Appeals was correct, a question not, of course, raised by the present petition, petitioner was responsible for the full $23,000. And if it was incorrect he was responsible for about $12,000, which was substantially the amount of unreported income charged to him in the first count of the indictment. (R. 5–6).

firmed it at the trial. (R. 287–288, 316–317.) Asserting, however, that the Government's only proof of net worth at the beginning of 1946 was the *tentative* computation (Pet. 6–7) presented to him on March 21, 1949, the results of which he failed to explain satisfactorily to the agents, he urges (Pet. 4–7, 12–15) that the Government failed to establish with reasonable certainty his net worth *at the beginning of 1946*. Petitioner tilts with a man of straw, conceived of the fact that no witness for the Government presented the *final* computation based on all the evidence before the jury. But, as will be seen from the tabulation in the Appendix, *infra*, pp. 18–19, there was abundant evidence of the net worth at the beginning of all the years from 1943 to 1946, inclusive, and it was sufficient that the final assembly and computation, a purely clerical and mathematical task, was performed by the prosecutor in the course of his argument to the jury.*

Nor is there any basis for the suggestion (Pet. 2, 5, 14) that the computation failed to include the assets of petitioner's wife. She testified at some length as to her personal holdings (R. 267–273, 277–278), and all were included in the Government's final computation. See Appendix, *infra*, pp. 18–19.

At no time during the course of the trial did petitioner challenge the accuracy of any item

* See footnote 4, *supra*, pp. 7–8.

in the Government's net-worth computation.[9] His whole defense to this aspect of the Government's case was that he could not possibly have made such profits as were indicated by the computation, and that, while there might have been some unreported income, he had no intention of evading taxes. (R. 310–312, 319–320, 322.) Petitioner is, therefore, mistaken when he asserts (Pet. 7–8) that there were sharp challenges to many of the Government's figures. Moreover, the present objections will be found upon examination to be baseless.[10] In any event, petitioner

[9] Nor did petitioner raise any specific objection of this nature in the Court of Appeals.

[10] In answer to these objections, which are to be found in petitioner's Appendix B (Pet. 24–26), we submit the following brief comments:

(1) A routine audit of the Ruby Sales Company's returns, conducted prior to the present investigation, showed that the partnership had reported a net total of $1,051.31 more income than it should have for the years 1943, 1944 and 1945. (R. 152–154, 393.) Petitioner agreed to this adjustment. (R. 393.) The incorrect figures in the returns had been taken from the company books, and the total investment shown in the company's balance sheet at the end of 1945 (R. 60, 372–374) was, therefore, properly reduced by this amount in the Government's final computation. (See Appendix, *infra*, p. 18.)

(2) It is urged that petitioner should have been given credit for $562 representing taxes actually paid in 1947. He was so credited, and the figure used in the final computation is $5,145.24 ($2,805.39 plus $2,339.85), the figure he says is correct. See Appendix, *infra*, p. 19.

(3) Petitioner argues he should have been credited with $143.50 dividends which he reported in his 1946 return in addition to the partnership income. He was credited with

endeavors to explain only the $14,600 increase shown by the agents' tentative computation, whereas the final computation demonstrated an increase of almost $23,000.

There can be no doubt of the sufficiency of the evidence to establish petitioner's guilt. At the trial he did not seriously challenge the accuracy of the unreported income shown by the Government's computation, but contended that the failure to report it was unintentional. This was refuted by his admitted practice of padding expense accounts and withholding receipts from his bookkeeper; by his destruction of memoranda recording those receipts; by the safe deposit box incident; and by the conflicting explanations given the agents during the investigation. In

payment of this amount in the final computation; the return showing this amount was in evidence at the trial (R. 357). See Appendix, *infra*, p. 19.

(4) It is urged that $3,196.20, paid to settle an O. P. A. violation, was a deductible expense which should not have been included among the nondeductible expenditures. It was not so included in the final computation. Compare R. 107, 401, with Appendix, *infra*, p. 19.

(5) It is urged that the schedule of living expenses was far too high. It was not challenged at the trial. At one point during the investigation petitioner thought it was excessive, but he conceded its accuracy after carefully reexamining it. See footnote 1, *supra*, p. 5.

(6) Petitioner implies that he was not given credit for nontaxable income received by his wife in the shape of support money from her first husband, gifts from her mother, and repayment of a loan and an insurance policy. The final computation gives credit for all these as shown by the record. Compare R. 267–272, 276–278, with Appendix, infra, p. 19.

this Court, characterizing the Government's case against him as dependent upon the tentative computation drawn up by the agents early in their investigation, and wholly ignoring the ultimate figures clearly proved by the Government at the trial, petitioner endeavors to raise issues not presented by the record. Neither during the trial proceedings nor in the present petition has petitioner been able to point to any flaw in the manifest evidence of unreported income.

2. There is no merit in the contention (Pet. 17) that the comments of the trial judge were so prejudicial as to deprive petitioner of a fair trial. As the opinion of the Court of Appeals points out (Pet. 21–22), the record discloses that the actions of which petitioner complains were motivated by a desire "to expedite the trial rather than to take sides with either the plaintiff or the defendant" (Pet. 21). There was nothing in the passages cited (Pet. 26–33) to indicate to the jury that the trial judge thought petitioner guilty, and, as a matter of fact, his most emphatic remarks were not even heard by the jury (R. 166, 212). Furthermore, the trial judge made it unmistakably clear in the final charge that his own comments were to be disregarded. At the outset he warned the jury that nothing he had said was evidence (R. 338), and toward the close he instructed them that he had not intended to indicate any personal opinion as to the facts, that they

should disregard any remark that seemed to give such indication, that they were the sole judges of the facts, that they were to make their decision fairly and impartially on the evidence only, and that it was their prerogative, not his, to determine where the ultimate truth of the case lay (R. 341–342).[11]

[11] Two objections to the trial court's charge, neither of which was raised in the courts below and neither of which is included among the questions petitioner presents for review, are mentioned in petitioner's Reasons for Granting the Writ. They require but brief comment.

(1) There is no merit in the contention (Pet. 16) that the trial court failed to instruct the jury that it was necessary for the Government to establish petitioner's net worth at the starting point. No such instruction was requested by the defense. (R. 329–337.) Petitioner himself, as we have noted (*supra*, p. 7), conceded the accuracy of the Government's actual starting point net worth, as of January 1, 1943, and there was no real issue as to his net worth at the beginning of 1946. Furthermore, the essence of the requested charge was contained in the court's instruction that the Government must establish beyond a reasonable doubt that petitioner had attempted to evade income taxes by underreporting his income. (R. 338–340.)

(2) Further exception is taken to the court's instructions (Pet. 16–17), in that "reasonable doubt" was defined as the kind of doubt upon which the jurors "might be willing to act" (R. 339). For the reasons expressed in our brief in *Holland* v. *United States*, *supra*, pp. 73–77, we submit that this point, even if properly presented, would constitute no basis for reversal. Moreover, the matter is an obvious afterthought, for defense counsel assured the trial court at the conclusion of the charge that he had no objection and that the instructions were "very fair" (R. 344), and no issue of this sort was raised in the Court of Appeals (Pet. 20).

CONCLUSION

The decision of the court below is correct, and no question warranting review is presented. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1954

APPENDIX

Irving M. and Zelda Rubenstein—Reconstructed income

[NET WORTH]

	1/1/43	12/31/43	12/31/44	12/31/45	12/31/46	Witness and citation
Assets:						
Investment in Ruby Sales Company	$3,600.00					Zeldin, R. 99; Exhibit 30.
Investment in Ruby Sales Company		$30,322.13				Ginsberg, R. 61; Exhibit 31.
Investment in Ruby Sales Company			$44,757.42			Ginsberg, R. 61; Exhibit 30.
Investment in Ruby Sales Company				$40,466.66		Ginsberg, R. 60; Exhibit 29.
Investment in Ruby Sales Company					$64,517.44	Ginsberg, R. 59; Exhibit 28.
Investment in Ruby Sales Company (adjustment)		(1,481.75)	(1,200.59)	(1,081.31)		Ginsberg, R. 64; Defendant's Exhibit A.
First National Bank of Denver:						
Personal checking account	971.03	471.48	130.89	868.12	215.66	Anderson, R. 30; Exhibit 18.
Savings account No. 120971	300.00	2,198.10				Anderson, R. 32; Exhibit 17.
Denver National Bank:						
Savings account No. 70092	137.60	3,200.00	171.97	626.64	1,545.01	Dunn, R. 34; Exhibits 18, 19.
American National Bank of Denver:						
Personal checking account					1,446.76	Bertolit, R. 36, 151; Exhibit 54.
Loans receivable—Cooper Drug Co.	1,600.00					Louis Rubenstein, R. 82.
Automobile—1941 Oldsmobile	1,200.00	1,200.00	1,200.00	1,200.00		Zeldin, R. 97; Exhibit 48.
Investors Diversified Services	430.00	732.50	732.50	732.50	732.50	Barlow, R. 56.
U. S. Savings Bonds—Series E (at cost)	1,012.50	2,906.25	11,475.00	10,863.75	10,200.00	Exhibit 55.
U. S. Treasury Notes—Series C (at cost)			15,000.00	10,000.00	10,000.00	Duck, R. 54.
Personal residence			10,274.21	10,274.21	10,274.21	Blue, R. 50; Exhibit 27.
Cashiers checks and drafts on hand			6,500.00			Zeldin, R. 101, 104.
Cashiers checks and drafts on hand					1,275.00	Bertolit, R. 39; Fernandes, R. 68; Exhibits 22, 23.
Deposit on auto—Standard Motors Co.				100.00	100.00	Gertz, R. 49.
Mink coat				2,250.00	2,250.00	Zeldin, R. 106; Zelda Ruby, R. 272.
Stock shares				6,739.38	6,739.38	Mullen, R. 48; Exhibit 26.
Accounts receivable—Harris Upham & Co.				13.50		Mullen, R. 48; Exhibit 26.
Ruby Sales Co.—Checks cashed and on hand					4,000.00	Zeltzer, R. 70; Ginsberg, R. 62; Exhibits 32, 33, 34, 35.

(15)

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Ruby Sales Co.—Checks cashed and on hand					3,000.00	Siegal, R. 76; Ginsberg, R. 63; Exhibits 36, 37, 38.
Ruby Sales Co.—Checks cashed and on hand					1,351.67	Zeldin, R. 111; Ginsberg, R. 63; Exhibit 53.
Loans receivable—Ruby Sales Co					4,800.00	Zeldin, R. 106.
Loans receivable—Sam and Sol Rubenstein					1,150.00	S. Rubenstein, R. 68.
Currency on hand	30,400.00	18,220.00				Wald, R. 171. (See also Wald, R. 174; Zeldin, R. 97; Ruby, R. 317, 320, 322; Exhibits 48, 55.)
Liabilities:						
Mortgage payable—Ida Cohen			(6,000.00)	(6,000.00)	(6,000.00)	Kornfield, R. 52; Blue, R. 50.
Total net worth	39,641.13	57,768.71	51,041.30	85,833.43	117,727.61	
Net worth increase		18,127.58	23,272.59	4,792.13	31,894.18	
Nondeductible expenditures:						
Personal		4,174.68	7,148.64	9,128.93	9,659.84	Zeldin, R. 103, 96, 98; Exhibits 52, 46, 47, 49.
Federal income taxes paid—I. M. Ruby		1,328.48	1,905.45	1,556.78	2,805.30	Hoeft, R. 26.
Federal income taxes paid—Zelda Ruby		701.28	2,467.30	2,033.15	2,339.85	Hoeft, R. 27.
Colorado State income tax paid					194.00	Healy, R. 57 } Standard deduction claimed
Contributions					568.00	Return, Exhibit 1. } in computing Taxable Net
Payments to Rose Ruby					1,300.00	Rose Ruby, R. 92. } Income.
Required income		24,332.02	34,763.98	17,510.99	48,761.26	
Nontaxable income:						
Investment of Zelda Ruby		(3,000.00)				Zelda Ruby, R. 269.
Proceeds of Life Ins. (invested in bonds)			(250.00)			Zelda Ruby, R. 268, 272.
Repayment of loan (invested in bonds)			(1,000.00)			Zelda Ruby, R. 268, 272.
Allotment checks (invested in bonds)			(450.00)	(450.00)	(450.00)	Zelda Ruby, R. 277, 272.
Gifts (invested in bonds): Note (*)			(775.00)	(37.50)	(862.50)	Zelda Ruby, R. 272.
Required adjusted gross income		21,332.02	32,313.98	17,023.49	47,448.76	
Adjusted Gross Income Returned:						
I. M. Rubenstein		12,458.85	8,080.12	9,348.08	12,251.22	Returns, Exhibits 9, 6, 7, 8.
Zelda Rubenstein		8,670.44	8,080.11	9,348.08	12,207.71	Returns, Exhibits 10, 11, 12, 13.
Unreported income		202.73	16,158.75	(1,672.67)	22,989.83	

Note (*): No amounts or dates testified to by Mrs. Ruby. Allowed in an amount to account for bonds registered in the names of Mrs. Zelda Ruby and/or Marlene Levin, Exhibit 55, in recognition of Mrs. Ruby's testimony, R. 272, that these bonds were acquired with the proceeds of a repaid loan, and insurance policy, allotment checks, and sundry gifts.

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